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No. 99-5291

(4)

Supreme Court, U.S.
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CLERK

IN THE SUPREME COURT OF THE UNITED STATES

CAREY DEAN MOORE,

Petitioner,

v.

STATE OF NEBRASKA,

Respondent.

REPLY BRIEF OF PETITIONER IN RESPONSE TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Submitted by:

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13 pp

CAPITAL CASE

QUESTION PRESENTED

Whether or not executing Moore now almost twenty years after his crimes and nineteen years after his initial death sentence constitutes cruel and unusual punishment where over half the delay is due to intentional and/or negligent actions of the State (essentially unsuccessful appeals by the State) that had the obvious consequence of delaying the execution for years.

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The Privy Council is the highest appellate court in the British Commonwealth. Before the Lackey Memorandum, in Pratt v. Attorney General of Jamaica, (1994) AC 1, 4 All ER 769, the Privy Council invalidated a Jamaican death sentence sought to be imposed over five years after sentence. The delay constituted " inhumane or degrading" punishment. After the Lackey Memorandum, the same conclusion was reached by the Privy Council on an execution in Trinidad delayed four years and ten months. Guerra v. Baptiste, (1995) JCJ No. 43.

The Lackey Memo itself refers us to state Supreme Court decisions declaring the death penalty unconstitutional based in part on the cruelty of long delayed executions. "The cruelty lies . . . also in the dehumanizing effects of the lengthy imprisonment prior to execution." People v. Anderson, 6 Cal3d 628, 649, 493 P.2d 880, 894 (1972). See also District Attorney for Suffolk County v. Watson, 411 N.E. 1274 (Mass. 1980). The Lackey Memorandum also surveys some of the U.S. Supreme Court's own commentary on delay as cruel ("most horrible"). In Re Medley, 134 U.S. 160, 172, 10 S.Ct. 384, 388, 33 LEd2d 346 (1972). See also Trop v. Dulles, 356 U.S. 86, 101-102 (1958) recognizing that inmates can suffer a "fate of ever increasing fear and distress." See also Furman v. Georgia, 408 U.S. 238 (1972), where Justice Brennan observed that the "prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death." 408 U.S. 288-289; and see the observations of Justices Stevens and

Breyer in Gomez v. Fierro, 117 S.Ct. 285-286 (1996).

II.

MOORE PRESENTS FACTS IDEALLY SUITED TO THE THOUGHTFUL CONSIDERATION OF DELAYS AND THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT.

Lackey suggests a triage of sorts:

> It may be appropriate to distinguish, for example, among the delays resulting from (a) a petitioner's abuse of the judicial system by escape or repetitive, frivolous filings; (b) a petitioner's legitimate exercise of his right to review; and (c) negligence or deliberate action by the state.
>
> 115 S.Ct. at 1422.

Moore clears that bar. All nineteen years since sentencing have been either (b) or (c). As pointed out in the Petition, a fair accounting of the delay would put over half the delay caused by Nebraska's dithering on the "exceptional depravity" issue (Petition for Writ of Certiorari, p. 11, 12; Time Line, Appendix P. 28, 29). A better case to meet this threshold consideration may not come along soon. Hence, the Court should take the opportunity Moore's special facts provide by granting certiorari.

III.

NEBRASKA BEGS THE DISPOSITIVE QUESTIONS.

To assume as true that which is disputed is the classic fallacy in logic of begging the question. Nebraska does this on at

least two significant arguments.

Nebraska claims Moore has no right to complain because appeals (his own or the State's) have kept him alive nineteen years after sentence. This assumes as true the proposition excessive delays do not violate the Eighth Amendment, the very matter in dispute. Analyzed without begging the question, one simply asks if and when excessive delays became cruel and unusual, then doesn't the death sentence that lingered over the prisoner mean the State has in error added to the severity of a sentence to life in captivity, a number of years of living in terror of execution?

Nebraska then begs two questions in one argument. It asserts that Moore's cruel and unusual argument runs afoul of the due process clause. (Brief in Opposition, p. 6). Again, Nebraska has assumed it is right on the disputed cruel and unusual punishment issue. Then, it assumes the due process clause must in all instances justify all manner of delays, a point put squarely in dispute by the Petitioner and the Lackey Memorandum.

Nebraska's due process comments and its framing the question presented as one creating a conflict between due process and cruel and unusual considerations has stumbled into the heart of the capital punishment mess in America. Thirty-eight states and the United States glut the courts with capital cases for everything from murders in bar fights to terroristic bombing mass murders.

By granting certiorari, maybe the balancing of significant considerations can begin: do we need more death sentences than appellate courts can speedily review? Isn't due process the far

more fundamental constitutional tradition than that of a state's power to execute? The former is essential to democracy, the latter an option as demonstrated by twelve states and all western democracies not permitting capital punishment.

If Moore gets certiorari and then prevails, the impact in state legislatures would be immediate. The pool of capital cases would keep the terroristic bombers and serial killers. Bar fight murders, Frankie & Johnnie killings, felony murders, and many more may move to the mandatory life pool. (See Dwight Aarons, "Getting Out of This Mess: Steps Towards Addressing and Avoiding Inordinate Delays in Capital Cases," 89 Journal of Criminal Law and Criminology, 1-80, Fall 1998, for an excellent discussion of this problem and its solution of downsizing the pool of capital cases and improvements in the review process.)

CONCLUSION

Nebraska concludes its brief by flirting with the idea it should ask the Court to grant certiorari to reject the argument so we can get this behind us as a nation, then concludes that would just waste time. It would only be a waste of time if this Court treated the Lackey Memorandum arguments like the lower courts have. Moore presents a serious case that has within it the elements that can begin the arduous process of solving the due process/delay/death row jam/court jam problems we find ourselves in. Certiorari should be granted.

RESPECTFULLY SUBMITTED,

CAREY DEAN MOORE, Petitioner,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the foregoing Reply Brief of Petitioner in Response to Respondent's Brief in Opposition to Petition For Writ of Certiorari were mailed to Donald B. Stenberg, Attorney General for the State of Nebraska, J. Kirk Brown, Counsel of Record, P.O. Box 98920, Lincoln, Nebraska 68509-8920, by regular United States mail, postage prepaid, on the 19 day of August, 1999.

Ed Fogarty

APPENDIX

Page

Lackey v. Texas, 514 U.S. 1045, 115 S.Ct. 1521, 131 LEd2d 304 (1995) 1-2

Court of Appeals for the Ninth Circuit denied.

1

514 U.S. 1045, 131 L.Ed.2d 304

Charles MORROW, petitioner,
v. UNITED STATES.
No. 94-1444.
March 27, 1995.

Case below, 39 F.3d 1228.

Petition for writ of certiorari to the United States Court of Appeals for the First Circuit denied.

Justice BREYER took no part in the consideration or decision of this petition.

2

514 U.S. 1045, 131 L.Ed.2d 304

Clarence Allen LACKEY, petitioner,
v. TEXAS.
No. 94-8262.
March 27, 1995.

Leave to File Petition for Rehearing Denied April 14, 1997.

See — U.S. —, 117 S.Ct. 1465.

On petition for writ of certiorari to the Court of Criminal Appeals of Texas.

The petition for a writ of certiorari is denied.

Memorandum of Justice STEVENS, respecting the denial of certiorari.

Petitioner raises the question whether executing a prisoner who has already spent some 17 years on death row violates the Eighth Amendment's prohibition against cruel and unusual punishment. Though the importance and novelty of the question presented by this certiorari petition are sufficient to warrant review by this Court, those factors also provide a principled basis for postponing consideration of the issue until after it has been addressed by other courts. See, *e.g.*, *McCray v. New York*, 461 U.S. 961, 103 S.Ct. 2438, 77 L.Ed.2d 1322 (1983) (STEVENS, J., respecting denial of certiorari).

Though novel, petitioner's claim is not without foundation. In *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), this Court held that the Eighth Amendment does not prohibit capital punishment. Our decision rested in large part on the grounds that (1) the death penalty was considered permissible by the Framers, see *id.*, at 177, 96 S.Ct., at 2927 (opinion of Stewart, Powell, and STEVENS, JJ.), and (2) the death penalty might serve "two principal social purposes: retribution and deterrence," *id.*, at 183, 96 S.Ct., at 2929–2930.

It is arguable that neither ground retains any force for prisoners who have spent some 17 years under a sentence of death. Such a delay, if it ever occurred, certainly would have been rare in 1789, and thus the practice of the Framers would not justify a denial of petitioner's claim. Moreover, after such an extended time, the acceptable state interest in retribution has arguably been satisfied by the severe punishment already inflicted. Over a century ago, this Court recognized that "when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it." *In re Medley*, 134 U.S. 160, 172, 10 S.Ct. 384, 388, 33 L.Ed. 835 (1890). If the Court accurately described the effect of uncertainty in *Medley*, which involved a period of four weeks, see *ibid.*, that description should apply with even greater force in the case of delays that last for many years.* Finally, the additional deterrent effect from an actual execution now, on the one hand, as compared to 17 years on death row followed by the prisoner's continued incarceration for life, on the other, seems minimal. See, *e.g.*, *Coleman v. Balkcom*, 451 U.S. 949, 952, 101 S.Ct. 2031, 2033, 68 L.Ed.2d 334 (1981) (STEVENS, J., respecting denial of certiorari) ("[T]he deterrent value of incarceration during that period of uncertainty may well be comparable to the consequences of the ultimate step itself"). As Justice White noted, when the death penalty "ceases realistically to further these purposes, . . . its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment." *Furman v. Georgia*, 408 U.S. 238, 312, 92 S.Ct. 2726, 2764, 33 L.Ed.2d 346 (1972) (opinion concurring in judgment); see also *Gregg v. Georgia*, 428 U.S., at 183, 96 S.Ct., 2929 ("[T]he sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering").

Petitioner's argument draws further strength from conclusions by English jurists that "execution after inordinate delay would have infringed the prohibition against cruel and unusual punishments to be found in section 10 of the Bill of Rights 1689." *Riley v. Attorney General of Jamaica*, [1983] 1 A.C. 719, 734, 3 All E.R. 469, 478 (P.C.1983) (Lord Scarman, dissenting, joined by Lord Brightman). As we have previously recognized, that section is undoubtedly the precursor of our own Eighth Amendment. See, *e.g.*, *Gregg v. Georgia*, 428 U.S., at 169–170, 96 S.Ct., at 2922; *Harmelin v. Michigan*, 501 U.S. 957, 966, 111 S.Ct. 2680, 2686, 115 L.Ed.2d 836 (1991) (SCALIA, J., concurring in judgment).

Finally, as petitioner notes, the highest courts in other countries have found arguments such as petitioner's to be persuasive. See *Pratt v. Attorney General of Jamaica*, [1994] 2 A.C. 1, 4 All E.R. 769 (P.C.1993) (en banc); *id.*, at 32–33, 4 All E.R., at 785–786 (collecting cases).

Closely related to the basic question presented by the petition is a question concerning the portion of the 17-year delay that should be considered in the analysis. There may well be constitutional significance to the reasons for the various delays that have occurred in petitioner's case. It may be appropriate to distinguish, for example, among delays resulting from (a) a petitioner's abuse of the judicial system by escape or repetitive, frivolous filings; (b) a petitioner's legitimate exercise of his right to review; and (c) negligence or deliberate action by the State. Thus, though English cases indicate that the prisoner should not be held responsible for delays occurring in the latter two categories, see *id.*, at 33, 4 All E.R., at 786, it is at least arguable that some portion of the time that has elapsed since this petitioner was first sentenced to death in 1978 should be excluded from the calculus.

As I have pointed out on past occasions, the Court's denial of certiorari does not constitute a ruling on the merits. See, *e.g.*, *Barber v. Tennessee*, 513 U.S. 1184, 115 S.Ct. 1177, 130 L.Ed.2d 1129 (1995); *Singleton v. Commissioner*, 439 U.S. 940, 942 (1978) (STEVENS, J., respecting denial of certiorari). Often, a denial of certiorari on a novel issue will permit the state and federal courts to "serve as laboratories in which the issue receives further study before it is addressed by this Court." *McCray v. New York*, 461 U.S., at 963, 103 S.Ct., at 2439. Petitioner's claim, with its legal complexity and its potential for far-reaching consequences, seems an ideal example of one which would benefit from such further study.

Justice BREYER agrees with Justice STEVENS that the issue is an important undecided one.

*See also *People v. Anderson*, 6 Cal.3d 628, 649, 100 Cal.Rptr. 152, 166, 493 P.2d 880, 894 (1972) ("The cruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the dehumanizing effects of the lengthy imprisonment prior to execution during which the judicial and administrative procedures essential to due process of law are carried out. Penologists and medical experts agree that the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture") (footnote omitted); *Furman v. Georgia*, 408 U.S. 238, 288–289, 92 S.Ct. 2726, 2751–2752, 33 L.Ed.2d 346 (1972) (Brennan, J., concurring) ("[T]he prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death"); *Solesbee v. Balkcom*, 339 U.S. 9, 14, 70 S.Ct. 457, 94 L.Ed. 604 (1950) (Frankfurter, J., dissenting) ("In the history of murder, the onset of insanity while awaiting execution of a death sentence is not a rare phenomenon"); *Suffolk County District Attorney v. Watson*, 381 Mass. 648, 673, 411 N.E.2d 1274, 1287 (1980) (Braucher, J., concurring) (death penalty is unconstitutional under State Constitution in part because "[i]t will be carried out only after agonizing months and years of uncertainty"); *id.*, at 675–686, 411 N.E.2d, at 1289–1295 (Liacos, J., concurring).

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August 19, 1999

William K. Suter
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1 First Street NE
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Re: Moore v. State of Nebraska
CAPITAL CASE

Dear General Suter:

I enclose Petitioner's Reply to Nebraska's Brief in Opposition to Petition for Writ of Certiorari and a Supplement to Petitioner's Poverty Affidavit plus ten copies of each.

Thank you.

Sincerely,

FOGARTY, LUND & GROSS

Edward F. Fogarty

EFF:dn
Enclosures

cc: Donald B. Stenberg
Attorney General of the State of NE

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